



**Shangasu v Republic (Criminal Appeal E042 of 2023)
[2024] KECA 1223 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1223 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E042 OF 2023
PO KIAGE, LA ACHODE & A ALI-ARONI, JJA
SEPTEMBER 20, 2024**

BETWEEN

SAID SALIM SHANGASU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the judgement of the High Court at Nairobi
(Lessit J.) dated 8th March 2016, in NAI HCCR CASE NO. 108 OF 2012)*

JUDGMENT

1. Said Salim Shangasu, the appellant, has appealed against the judgment of Lessit J, (as she then was) in the High Court at Nairobi. He was committed for trial on information of murder contrary to Section 203 read with Section 204 of the Penal Code. The particulars were that on 9th December 2012 at Muchatha Village, Kiambu District within Kiambu County, the appellant murdered Boniface Njeru Njagi. He pleaded not guilty to the charge and was subjected to a full hearing, with the prosecution calling 8 witnesses to prove their case.
2. A chronicle of the case for the prosecution began with PW1, Mary Nyambura, who saw the appellant and the deceased, who were persons known to her, fighting by the roadside earlier on the material day. She saw them fighting for the second time at about 8:00pm near her stall at the market. In both instances, she did not know what the bone of contention was. Both men appeared drunk and it was PW1’s testimony that the two men often fought for no reason, whenever they were in that state. A police officer who arrived on the scene slapped the appellant and ordered him to go home. The deceased offered to escort the appellant home so that he would not be arrested but the appellant declined and instead, called him a prostitute telling him to leave him alone. The deceased slapped the appellant and the appellant walked away.



3. The deceased then instructed PW1 to chop some kales for him and take them to her house, together with a can of paraffin. He would pass by to collect them later. At 8:30p.m, the deceased went to PW1's house to collect his goods and was served some food. PW1 went out of her house to use the latrine and saw the appellant standing near her house. The appellant called her but she did not go to him. Instead, she went back into the house and warned the deceased not go out just yet, as the appellant was standing outside her house.
4. When it was time to leave, the deceased asked one Kevin, an older man who was in PW1's house, to escort him. PW1 stood at the door as the deceased walked away. Suddenly she heard a horrifying sound of a man crying out, and on running to the scene she found the appellant and the deceased fighting once again. PW1 went back into her house to fetch a lamp and when she returned to the scene she found the deceased lying on the ground covered in blood. His blood-stained yellow polo neck was produced in evidence, (Exh 1). PW1 screamed for help.
5. PW3, Elizabeth Wanjiru, and PW6, Elizabeth Mukua, who lived on either side of the appellant's room heard someone enter his room immediately after the scream. PW2, Jane Nyakina Mungai, who also lived nearby heard the scream from PW1 and called the police on her phone. Meanwhile, PW6 went out and locked the door to the appellant's room from outside until PW7, APC Peter Ndichu Chege, a police officer, came to the scene and arrested the appellant.
6. PW7 noted the bloodied polo neck that the deceased was wearing. PW8, CPC George Onamu, the investigating officer, received the appellant and the deceased's polo neck from PW7. He sent the polo neck to the government examiner for DNA profiling. He also visited the scene after the arrest and instructed PW2 and PW6 to search for the murder weapon. They subsequently found a knife in the bushes next to the plot and handed it to PW7 who passed it on to PW8. It was later produced in evidence, (Exh 2).
7. At the close of the prosecution case, the appellant was placed on his defence. He opted to keep quiet and say nothing in his defence.
8. The Learned Judge considered the evidence in its entirety and concluded that the prosecution had proved the offence of murder contrary to Section 203 of the Penal Code against the appellant beyond reasonable doubt. She convicted him and sentenced him to death in accordance with the law.
9. The appellant was displeased by the decision and he filed a Memorandum of Appeal to this Court, faulting the learned Judge on the following grounds: the mens-rea was not proved within the meaning of Section 206 of Penal Code, the prosecution evidence was contradictory and inconsistent, the trial Judge did not fully analyze the entire record before convicting him, the appellant's constitutional right to a fair hearing enshrined in Article 50(2) was violated, the appellant was not properly identified, and the prosecution did not prove the case against him beyond reasonable doubt.
10. The firm of M/s Marygoretti Chepseba Advocate, filed written submissions dated 15th March 2024 on behalf of the appellant, and stated that: the evidence was contradictory, the appellant's election to remain silent was not proof of guilt as the onus of proving his guilt remained on the prosecution without shifting to the defence throughout the trial, there were no eye witnesses to the assault of the deceased and the Judge ought not to have believed PW1 on this aspect without further scrutiny, the prosecution's evidence placing the appellant at the scene of the crime was contradictory and the mens rea was not proved.
11. Counsel submitted further that the trial Judge relied on circumstantial evidence instead of direct evidence that is required to establish the offence of murder. She cited the case of *Mwangi v R* [1938] KLR 522 to support this argument. She contended that there was no conclusive forensic evidence on



the murder weapon and the investigation as a whole was poorly conducted. She also submitted that the appellant's mitigation was not considered. She cited the case of Francis Muruatetu v Republic - Petition No. 15 & 16 of 2015, to urge that the mandatory death sentence imposed upon him was harsh. She prayed that the appeal be allowed, conviction quashed, sentence set aside and the appellant be acquitted.

12. The respondent's written submissions dated 15th April 2024 were filed by O.J Omondi senior Assistant Director of Public Prosecution, (SADPP) in opposition to the appeal. He reiterated the evidence in the Record of Appeal and asserted that all the ingredients of murder were proved beyond reasonable doubt and that the circumstantial evidence zeroed in exclusively on the appellant as the perpetrator of the offence.
13. During the plenary hearing in the virtual court, learned counsel M/s Chepseba appeared for the appellant, while learned State counsel Mr Omondi, SADPP appeared for the respondent. They both briefly highlighted their submissions reiterating what was filed.
14. From the grounds of the appeal, the submissions and the record as a whole, we distil the following two issues for determination:
 - i. Whether the ingredients of murder were established?
 - ii. Whether the sentence was commensurate with the offence?
15. This being the first appeal, our mandate as set out in Rule 29(1) of the Court of Appeal Rules requires us to re-appraise the evidence and draw inferences of fact on the guilt or otherwise of the appellant. We have a duty to reconsider the record in totality as laid before the trial Judge. The mandate of the first appellate court, was re-stated in *Kiilu & Another vs. Republic* [2005] 1KLR 174 as follows:

“

 - “1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

See also *Okeno vs. Republic* [1972] EA 32.
16. Section 203 of the Penal Code provides as follows:
 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
17. The prosecution must prove certain fundamental elements beyond reasonable doubt to secure a conviction. There must be proof that a death occurred, that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful act that resulted in the death was actuated by malice aforethought.



18. In the case before us, there is no doubt that Bonface Njagi Njeru met an untimely death on the ill-fated night of 9th December 2012. In the post-mortem report dated 19th December 2012, compiled by Doctor Dorothy Njeru, a Pathologist at City Mortuary, the cause of death was established to be a chest injury due to a penetrating sharp force trauma (stabbing). Death was instantaneous.
19. The prosecution produced a knife, (Exh 2), as the murder weapon, which was used to stab the deceased and which was recovered in the bush next to the plot where the appellant and the deceased were seen fighting. The defence did not contest this evidence during the trial. Coming for the first time on appeal means that the trial court did not render itself on it for this Court to assess and either fault or uphold its reasoning. We are therefore satisfied that the cause of death was due to an unlawful act.
20. More irksome is the question of the identity of the perpetrator of the nefarious act that terminated the deceased's life. From the prosecution evidence, it is clear that none of the witnesses saw the appellant stab the deceased resulting in his death. The circumstantial evidence relied upon by the prosecution was that PW1 had seen the appellant lurking outside her house that night as the deceased was having supper inside. The deceased then departed leaving her standing at the door and presently, she heard what she described as a horrifying sound coming from a man. She went in the direction of the sound and found the appellant and the deceased engaged in a tussle once again.
21. PW1 went back into the house to fetch a lamp and returned only to find the deceased lying on the ground covered in blood. She screamed. PW3 and PW6 who occupied the rooms on either side of the appellant, heard someone enter his house in the wake of PW1's scream, whereupon PW6 went out and locked the appellant's door from the outside. When the door was opened upon the arrival of the police the appellant was found inside.
22. The conditions to be considered in the application of circumstantial evidence in order to sustain a conviction in a criminal trial have been laid down in several authorities of this Court. For instance, in *Abanga alias Onyango v. Republic* CR. App *NO. 32 of 1990* (UR) this Court held as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

 - (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
 - (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”
23. The Court amplified on the above exposition in *Sawe Vs. Republic* [2003] KLR 364, as follows:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”



24. In the more recent case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, this Court expounding on the weight to be placed on circumstantial evidence had this to say:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21:

‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

25. The chain of events runs from the fights between the appellant and the deceased earlier in the day; to the appellant lurking outside PW1’s house where the deceased was having his dinner; to the anguished cry of a male person shortly after the deceased left PW1’s house; to PW1 finding the two men fighting for the third time that day; to PW1 finding the deceased lying on the ground with his clothes soaked in blood a few minutes later, when she returned to the scene with a lamp and to the appellant being heard entering his house in the wake of PW1’s scream, where he was found a short while later when the police arrived.
26. We find that the chain of events as gleaned from the evidence of PW1, PW3 and PW6 places the appellant at the scene of the crime and links him to the murder to the exclusion of any other person. The inculpatory facts are incompatible with the innocence of the appellant, and are incapable of explanation upon any other reasonable hypothesis than that of his guilt. The circumstantial evidence therefore, points to the appellant alone as the person who murdered the deceased.
27. The next element that must be determined is whether the appellant had malice aforethought when he assaulted the deceased. Section 206 of the Penal Code defines Malice aforethought as follows;
206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
- a. an intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed or
 - b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused...”
28. The East African Court of Appeal pronounced itself on proof of malice aforethought in *Rex v Tubere s/o Ochen* {1945} 1Z EACA 63, as follows:
- “In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured.”



29. Also, in the case of *Hyam v DPP* {1974} A.C. the Court held inter alia, that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”

30. PW1 testified that she saw the appellant lurking outside her house, in what looks like he was biding his time for the deceased to emerge from PW1’s house. Indeed, shortly after the deceased walked away, PW1 heard a cry of anguish from a male person and on moving nearer, she found the deceased and the appellant fighting. We consider that there was sufficient time between the earlier scuffle and the fatal attack for the appellant to have relaxed and cooled down. This was not therefore, an assault in the heat of the moment.

31. The fact that the appellant waited for the deceased while armed with a knife and used that knife to stab him in the chest is an indication that his action was not only premeditated, but was intended to cause death or, at the very least, do grievous harm. The excuse of intoxication on the part of the appellant at the time of committing the offence is not available to him. We observe that after the incident, he had the presence of mind to toss the murder weapon in the bushes nearby and flee into his house. From these actions we deduce that he was well aware of his actions and their ramifications.

32. Consequently, from the foregoing analysis, it is our finding that the prosecution proved all the ingredients of murder beyond reasonable doubt and therefore the conviction was properly founded.

33. On whether the sentence was commensurate with the offence, the appellant urged that the death sentence meted upon him was harsh. The respondent’s position was that the actions of the appellant were deliberate and calculated. Hence, this Court should not only uphold the conviction but also the sentence.

34. Section 204 of the Penal Code provides that:

“ Any person who is convicted of murder shall be sentenced to death.”

The impugned judgement was pronounced on 8th March 2016 before the decision in *Francis Muruatetu & another* (supra), which declared the mandatory nature of that statutory edict of the death sentence unconstitutional.

35. The principle that guides interference with sentencing by an appellate court were set out by the predecessor of this Court in *Ogolla s/o Owuor v Republic*, [1954] EACA 270, as follows:

“ The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

36. A Judge ought to have discretion to take into account mitigating circumstances so as not to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused’s criminal culpability. The crime of murder can be committed with varying degrees of gravity and culpability and a blanket sentence fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to pay attention to the circumstances of an offence or the offender may result in an undesirable effect. (See *Francis Karioko Muruatetu* (supra)).



- 37. We reiterate that the death sentence imposed by the High Court is not unconstitutional and can still be meted out in deserving cases. It is the mandatory nature that was declared unconstitutional. We examined the circumstances of the case before us to establish whether the Appellant was deserving of a death sentence. We considered the appellant's mitigation and that he was treated as a first offender. We also note that he and the deceased were said to be buddies who engaged in scuffles whenever they were drunk, which was frequent.
- 38. On the other hand, we considered the gravity of the offence and the appellant's action resulted in the needless loss of a life in a brutal manner. In the end we are of the view that 30 years imprisonment is commensurate to the offence committed by the appellant.
- 39. Accordingly, the appeal succeeds partially. The conviction is upheld. The death sentence is set aside and substituted with a sentence of thirty (30) years imprisonment. The sentence shall run from the date of arrest.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024

P. O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

